UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HARVEY HARRISON,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**CIVIL NO. 02-104-P-H**
	)	
CORRECTIONAL MEDICAL SERVICES A/K/A SPECTRUM BEHAVIORAL SERVICES,	)	
	)	
DEFENDANT	)	

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

On April 23, 2003, I affirmed over objection a Recommended Decision of Magistrate Judge Cohen denying the defendant's motion for summary judgment on a particular theory of liability, stating:

> The defendant's major complaint is with the First Circuit's (arguably dictum) description of Maine's scope of *respondeat superior* and its broad acceptance of Restatement (Second) of Agency § 219(2)(d) ("aided in accomplishing the tort by the existence of the agency relation"). Costos v. Coconut Island Corp., 137 F.3d 46, 49 (1st Cir. 1998) (discussing McLain v. Training & Dev. Corp., 572 A.2d 494 (Me. 1990). But until the First Circuit or the Maine Law Court changes or clarifies this description, it governs, especially in a case like this when the employee's very access to the prisoner and any influence she had over him came from her employment.

Order at 1-2 (Docket No. 25). Unfortunately for the plaintiff's case, on May 1, 2003, the Maine Law Court did just that. It interpreted Restatement § 219(2)(d) as "limited in its application to cases within the apparent authority of the employee, or when the employee's conduct involves misrepresentation or deceit," Mahar, et

al. v. Stonewood Transport, No. HAN-02-441, 2003 Me. LEXIS 71 at **14 (Me. May 1, 2003), or in another formulation, limited "to cases involving apparent authority, reliance, or deceit." Id. at **15.[1] In Mahar, the Court rejected vicarious liability in a road rage suit against a company that employed the guilty trucker, stating that he "did not purport to act on behalf of [the trucking company], and he engaged in no misrepresentation or deceit; rather, he committed an assault and thereafter drove in a threatening manner." Id. at **16.

In this case, the plaintiff has presented no evidence that in making the tortious sexual contacts Nanci Porter, his counselor at the prison, purported to act on behalf of her employer, the defendant Correctional Medical Services, or that she had apparent authority to engage in such activities on its behalf, or that she engaged in misrepresentation or deceit. It is clear, therefore, that under the Law Court's latest interpretation of Restatement § 219(2)(d), the plaintiff's case against Porter's employer cannot proceed. Although my previous ruling on summary judgment is law of the case, I would have to apply the Law Court's recent pronouncement at any trial. There is no reason to defer until then at great expense to the parties. Based upon the Law Court's statements in Mahar, I therefore **GRANT** the defendant's motion for reconsideration, **VACATE** that portion of my previous order that denied summary judgment to the defendant, and **ORDER** that summary judgment be entered for the defendant on any claim of direct or vicarious liability for damages resulting from any sexual encounter or contact

[1] The Law Court also referred to the criticism that has been directed against Costos. See id. at **16 *(continued on next page)*

between the defendant's former employee, Nanci Porter, and the plaintiff (as well as on the plaintiff's claim for punitive damages, as previously ordered).

SO ORDERED.

DATED: MAY 30, 2003

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

n.6.

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 02-CV-104

Harvey Harrison

plaintiff

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v.

Correctional Medical Services
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defendant

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